BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WESLEY C. PRUE	)	
Claimant	)	
VS.	)	
	)	Docket No. 270,870
ASPLUNDH TREE EXPERT CO.	)	
Respondent	)	
AND	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the December 17, 2004, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on June 7, 2005.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for claimant. Timothy G. Lutz of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board, the parties agreed the May 29, 2002, letter from Dr. Theodore L. Sandow, Jr., to Judge Foerschler along with the doctor's January 22, 2002, medical report (both of which are exhibits to the October 10, 2002, preliminary hearing transcript) are part of the record for purposes of claimant's final Award.

The parties also agreed at oral argument that respondent's brief to the Board correctly set forth claimant's average weekly wage, including fringe benefits. Consequently, for purposes of computing any award, claimant's average weekly wage is as follows:

> From August 20, 2001, through January 31, 2002, the average weekly wage is $771.30.

From February 1, 2002, through October 27, 2003, the average weekly wage is $849.83.

And commencing October 28, 2003, the average weekly wage is $961.90.

Finally, the parties agreed respondent was entitled to the appropriate credit for the temporary total disability benefits paid for the period commencing April 15, 2003.

ISSUES

Claimant alleges he injured his back on August 20, 2001, while leaning and trimming trees from a lift bucket. In the December 17, 2004, Award, Judge Foerschler determined claimant sustained a 54 percent permanent partial general disability under K.S.A. 44-510e, which was based upon a 53 percent wage loss and a 55 percent task loss. The Judge also denied respondent's request for a credit for $375 that was charged when claimant failed to appear at a scheduled functional capacity evaluation.

Claimant contends Judge Foerschler erred. Claimant argues he is unable to work and, therefore, he is entitled to receive benefits for a permanent total disability under K.S.A. 44-510c.

Respondent also contends Judge Foerschler erred. Respondent argues claimant, if anything, sustained only a temporary injury in the alleged August 20, 2001, accident and that claimant's ongoing symptoms are related to preexisting scoliosis and degenerative disc disease. Respondent also requests reimbursement or credit for the $375 cancellation fee.

The issues before the Board on this appeal are:

1. Did claimant permanently injure his back on August 20, 2001, as a result of the work he was performing for respondent?

2. If claimant sustained an accidental injury at work that permanently injured his back, what is the nature and extent of claimant's injury and disability?

3. Is respondent entitled to receive either a reimbursement or credit for a $375 cancellation fee that it was charged when claimant missed an appointment to begin a functional capacity evaluation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified.

1. Did claimant permanently injure his back on August 20, 2001, as a result of the work he was performing for respondent?

Claimant contends he injured his back on August 20, 2001, trimming trees for respondent. On that date, claimant was leaning out of a lift bucket cutting large branches with a pole saw when he experienced low back pain. Claimant tried to continue to work that day but his back pain became so severe he was taken to a clinic.

After a stint of medications and physical therapy, claimant was released to light duty activities. But claimant could not perform the light duty work of standing and directing traffic that respondent offered as he was required to drive 70 miles to the work site, which hurt his back. Other than that attempt, claimant has not worked since August 20, 2001.

Claimant contends he permanently injured his back working for respondent. Conversely, respondent contends the August 20, 2001, incident only temporarily aggravated claimant's back as claimant's ongoing symptoms are more likely due to preexisting back problems.

The record contains several medical opinions regarding the nature of claimant's back injury. The first, from Dr. Theodore L. Sandow, Jr., who saw claimant in January 2002, reported to Judge Foerschler that claimant had a lumbosacral strain superimposed upon degenerative joint and disc disease and lumbar scoliosis. Dr. Sandow further stated that those preexisting conditions had made it easier for claimant to injure his back and develop symptoms.

One of claimant's treating doctors, Dr. Mark Bernhardt, who is a former partner of Dr. Sandow, first saw claimant in April 2003 and diagnosed chronic mechanical low back pain secondary to multiple level degenerative disc disease and mild degenerative spondylolisthesis at L4-5. According to Dr. Bernhardt, claimant aggravated the preexisting condition in his low back. The doctor rated claimant as having a 2.5 percent whole person functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.).[1]

[1] Bernhardt Depo. at 11-12, 41.

The record also includes the opinions of Dr. Edward J. Prostic, who saw claimant in November 2001 and again in December 2003. Dr. Prostic, whom claimant's attorney selected, determined the August 20, 2001, incident at work aggravated the preexisting scoliosis and degenerative changes in claimant's back. The doctor rated claimant under the AMA *Guides* (4th ed.) as having a 20 percent whole person functional impairment, which the doctor attributed most of, if not all, to the August 2001 accident as claimant was able to work as a tree trimmer on a regular basis before that incident.

Last, Dr. Steven L. Hendler, whom respondent selected to evaluate claimant for purposes of this claim, concluded the August 2001 incident only temporarily sprained or aggravated claimant's low back as claimant allegedly had a significant improvement in his symptoms after the incident. According to Dr. Hendler, who examined claimant in December 2003, claimant sustained no increase in functional impairment, sustained no task loss, and needed no work restrictions due to the alleged August 2001 accident. Moreover, the doctor believes there is nothing that precludes claimant from returning to his regular work duties as a tree trimmer and there is no reason claimant could not lift 80 pounds, but for the fact claimant is deconditioned.

Judge Foerschler concluded claimant permanently injured his back at work on August 20, 2001, and the Board agrees. The greater weight of the evidence establishes that claimant's preexisting back condition made claimant more prone to injury. Following the August 20, 2001, accident claimant has experienced back symptoms and problems that have not resolved. The Board finds it is more probably true than not that the August 2001 accident permanently aggravated claimant's preexisting back condition. Consequently, claimant is entitled to receive permanent disability benefits in this claim.

2. What is the nature and extent of claimant's injury and disability?

Claimant contends he must lie down during the day and, at the very least, he must frequently change positions. Accordingly, claimant contends he is unable to engage in substantial and gainful employment and, therefore, he argues he is entitled to receive benefits under K.S.A. 44-510c for a permanent total disability.

The Judge awarded claimant permanent partial general disability benefits rather than permanent total disability benefits. Although claimant should not return to work requiring physical labor, the Board finds that claimant has failed to prove that he is unable to engage in substantial and gainful employment.

First, claimant's own expert witness, Dr. Prostic, did not testify that claimant was unable to work. Instead, when asked about additional treatment, the doctor responded by

recommending nonoperative care and finding a job that claimant can do.[2] Moreover, Dr. Prostic indicated claimant could work within the following medical restrictions: occasional lifting limited to no more than 25 pounds, frequent lifting limited to no more than 10 pounds, avoid frequent bending and twisting at the waist, avoid forceful pushing and pulling, avoid more than minimal use of vibrating equipment, and avoid captive positions.

Second, Dr. Bernhardt initially restricted claimant to sedentary work but also noted claimant's functional capacity evaluation indicated claimant could perform light work. And the doctor did not address claimant lying down until responding to a September 12, 2003, letter from claimant's attorney.

Consequently, the Board concludes claimant should receive permanent partial disability benefits, not permanent total disability benefits, in this claim. Because a back injury is not included in the schedule of K.S.A. 44-510d, the computation of claimant's permanent disability benefits is governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

[2] Prostic Depo. at 35.

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

The Kansas Court of Appeals in *Watson*[6] held that failing to make a good faith effort to find appropriate employment does not automatically limit a worker's permanent partial general disability to the worker's functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

Claimant has failed to prove that he has made a good faith effort to find work. Since last working for respondent in August 2001 and since being released by Dr. Bernhardt in August 2003, claimant has made little effort to find a job. Although claimant should not return to jobs requiring physical labor, he retains the ability to perform sedentary work.

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Id.* at 320.

[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[7] *Watson* at Syl. ¶ 4.

Vocational expert Dick Santner did not provide an opinion regarding claimant's post-injury ability to earn wages as Mr. Santner believed that claimant was not capable of gainful employment. At vocational expert Michael J. Dreiling's deposition, the parties introduced into the record Mr. Dreiling's March 22, 2004, report. According to that report, claimant retains the ability to earn $8 to $9 per hour. For purposes of the wage loss prong of K.S.A. 44-510e, the Board finds claimant retains the ability to earn $8 per hour or approximately $320 per week.

For the periods set forth below, claimant has the following wage loss percentages:

For the period from August 20, 2001, through January 31, 2002, claimant's wage loss is 59 percent (comparing $771.30 per week to $320 per week).

For the period from February 1, 2002, through October 27, 2003, claimant's wage loss is 62 percent (comparing $849.83 per week to $320 per week).

Commencing October 28, 2003, claimant's wage loss is 67 percent (comparing $961.90 per week to $320 per week).

After meeting with claimant in September 2003, Mr. Santner developed a list of 10 job tasks claimant had performed in the 15-year period before his accidental injury. Mr. Santner and Mr. Dreiling agreed the tasks could be distilled to a total of nine job tasks when considering task numbers 2 and 5 as one task. In light of that, it is Dr. Prostic's opinion that claimant lost the ability to perform five of the nine tasks, or approximately 56 percent. And it is Dr. Bernhardt's opinion that claimant lost the ability to perform six of the nine tasks, or approximately 67 percent. Averaging the two task loss opinions, the Board finds claimant sustained a 62 percent task loss for purposes of the task loss prong of K.S.A. 44-510e.

The Board is mindful Dr. Hendler believes claimant experienced no task loss due to the August 2001 accident. But the Board finds that opinion unpersuasive.

Averaging the wage loss and task loss percentages for the periods set forth below, claimant's permanent partial general disability is as follows:

For the period from August 20, 2001, through January 31, 2002, claimant has a 61 percent permanent partial general disability (59 percent wage loss and 62 percent task loss).

For the period from February 1, 2002, through October 27, 2003, claimant has a 62 percent permanent partial general disability (62 percent wage loss and 62 percent task loss).

Commencing October 28, 2003, claimant has a 65 percent permanent partial general disability (67 percent wage loss and 62 percent task loss).

K.S.A. 44-501(c) provides that "[t]he employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

According to Dr. Hendler, claimant had a preexisting five percent whole person functional impairment. Dr. Prostic indicated the same. Dr. Bernhardt was not asked for his opinion as to what, if any, preexisting functional impairment claimant had. The Board finds claimant had a five percent whole person functional impairment that preexisted his August 20, 2001 accidental injury.

The Board finds that claimant's award of permanent partial general disability benefits should be decreased by five percent for preexisting impairment as provided by K.S.A. 44-501(c).

After deducting the preexisting five percent functional impairment from the disability percentages for the periods set forth below, claimant is entitled to receive benefits for the following percentages of permanent partial general disability:

For the period from August 20, 2001, through January 31, 2002, claimant receives benefits for a 56 percent permanent partial general disability (61 percent minus five percent).

For the period from February 1, 2002, through October 27, 2003, claimant receives benefits for a 57 percent permanent partial general disability (62 percent minus five percent).

Commencing October 28, 2003, claimant receives benefits for a 60 percent permanent partial general disability (65 percent minus five percent).

3. Is respondent entitled to receive either a reimbursement or credit for a $375 cancellation fee that it was charged when claimant missed an appointment to begin a functional capacity evaluation?

Respondent introduced evidence that claimant missed an appointment for a functional capacity evaluation that Dr. Bernhardt had requested before releasing claimant from treatment. As a result of that missed appointment, respondent was billed $375.

Respondent has cited no authority from the Workers Compensation Act that empowers an administrative law judge or this Board with the authority to assess such a fee against a worker. And the Board, likewise, has been unable to find such authority in the Act.

Nonetheless, K.S.A. 44-518 addresses the situation when workers refuse to submit to medical examinations as it provides for suspending benefits.

> If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination.[8]

But K.S.A. 44-518 is silent about assessing charges against workers for the missed appointment. On the other hand, K.S.A. 44-515, which generally addresses medical examinations, provides that "[t]he employee shall not be liable for any fees or charge of any health care provider selected by the employer for making any examination of the employee."

Moreover, should the Board have the authority to assess the charges for a missed appointment to a worker, the *Kansas Workers Compensation Schedule of Medical Fees* would apply. And it provides, in part:

> In the event a patient fails to keep a scheduled appointment, the health care provider is not to bill for any services that would have been provided by said appointment nor shall there be any reimbursement for such scheduled services; (i.e., reimbursement for a "no show" appointment is not allowed). This rule does not apply with regard to a deposition, testimony, or IME.[9]

Consequently, there is a question whether E.T.C. Physical Therapy should have billed respondent for the missed appointment.

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[8] K.S.A. 44-518.

[9] *Kansas Workers Compensation Schedule of Medical Fees* at 265-266 (Dec. 1, 2003).

The Board concludes respondent's request for a credit or to assess claimant the $375 charge for failing to attend a scheduled functional capacity evaluation should be denied as respondent has failed to establish that such a remedy exists in the Workers Compensation Act.

AWARD

WHEREFORE, the Board modifies the December 17, 2004, Award entered by Judge Foerschler, as follows:

Wesley C. Prue is granted compensation from Asplundh Tree Expert Co. and its insurance carrier for an August 20, 2001, accident and resulting disability. Mr. Prue is entitled to receive 64.14[10] weeks of temporary total disability benefits at $417 per week, or $26,746.38, plus 175.67 weeks of permanent partial general disability benefits at $417 per week, or $73,253.62, for a 60 percent permanent partial general disability and a total not to exceed $100,000.[11]

As of August 4, 2005, Mr. Prue is entitled to receive 64.14 weeks of temporary total disability compensation at $417 per week, or $26,746.38, plus 142.29 weeks of permanent partial general disability compensation at $417 per week, or $59,334.93, for a total due and owing of $86,081.31, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $13,918.69 shall be paid at $417 per week until paid or until further order of the Director.

Claimant is entitled to payment of all authorized medical benefits.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum upon presentation of proof of utilization.

Future medical benefits may be considered upon proper application to the Director.

Respondent and its insurance carrier's request for a credit or to assess claimant charges for failing to attend the functional capacity evaluation is denied.

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[10] Respondent and its insurance carrier are entitled to a credit for overpayment of the temporary total disability benefits paid for the period from April 15, 2003, through May 19, 2003, as provided by K.S.A. 44-525.

[11] Because of the statutory scheme of accelerated payout, claimant is entitled to the same number of weeks of benefits during the different post-injury periods whether that period is based upon claimant's latest average weekly wage and resulting 60 percent work disability or whether it is based upon each respective period's actual average weekly wage and resulting work disability.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director